No. 15977

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

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WILLIAM ALEX KARIAKIN,

*Appellant,*

*vs.*

UNITED STATES OF AMERICA,

*Appellee.*

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Appeal From the United States District Court for the Southern District of California, Central Division.

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## APPELLANT'S OPENING BRIEF.

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## TOPICAL INDEX

## TABLE OF AUTHORITIES CITED

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### Preliminary Statement.

This cause comes before this Honorable Court by the appeal of the defendant, William Alex Kariakin, from the judgment of conviction of violation of U. S. C., Title 50, App., Sec. 462—Universal Military Training and Service Act. No oral testimony was taken, the entire cause being submitted for decision upon the written file of appellant's local draft board.

Unless the entries in that written file are sufficient to prove every element of the offense covered by the indictment, and unless those entries show a compliance with the Regulations promulgated under the Universal Military Training and Service Act, the conviction cannot be sustained and the judgment of the lower court must be reversed.

## Applicable Regulations.

Certain provisions of the Code of Federal Regulations which will be referred to by appellant in this brief are herein set forth in full.

"1602.4 *Delinquent.* A 'delinquent' is a person required to be registered under the selective service law who fails or neglects to perform any duty required of him under the provisions of the selective service law.

"1642—*Delinquents.*

"1642.4 (b) When the local board declares a registrant to be a delinquent, it shall enter a record of such action and the date thereof on the registrant's Classification Questionnaire (SSS Form No. 100) and shall complete a delinquency notice (SSS Form No. 304), in duplicate, setting forth the duty or duties which the registrant has failed to perform. The local board shall mail the original to the registrant at his last known address and file a copy in his Cover Sheet (SSS Form No. 101).

"(c) A registrant who has been declared to be a delinquent may be removed from that status by the local board at any time. When the local board removes a registrant from delinquency status, it shall enter a record of such action and the date thereof on the registrant's Classification Questionnaire (SSS Form No. 100) and shall advise the registrant of such removal by letter a copy of which shall be filed in his Cover Sheet (SSS Form No. 101).

"1642.14 *Personal appearance, reopening, and appeal.*

"(b) The classification of a delinquent registrant who is classified in or reclassified into Class I-A or

Class I-A-O under the provisions of this part may be reopened at any time before induction in the discretion of the local board without regard to the restrictions against reopening prescribed in Sec. 1625.2 of this chapter.

"(c) When a delinquent registrant is classified in or reclassified into Class I-A or Class I-A-O under the provisions of this part, an appeal may be taken under the same circumstances and by the same persons as in any other case."

## Questions of Law.

Appellant raises the following questions of law, to-wit:

1. Is the evidence sufficient to sustain the judgment of conviction?

2. Did the local draft board set aside the classification of appellant prior to his indictment and thus deprive the court of jurisdiction to try him?

3. Has appellant been deprived of due process of law by the local draft board?

4. Has appellant been once in jeopardy?

## ARGUMENT.

### I.

### The Evidence Is Insufficient to Sustain the Conviction.

As appellant previously noted, all of the evidence submitted to the court was contained in the draft board's copy of appellant's selective service record. That record must be examined to determine the sufficiency of the evidence.

In testing the validity and sufficiency of the evidence, the court must view the record in the light of the Fifth Amendment to the Constitution of the United States.

> "An essential part of a procedure which can be said fairly to inflict . . . punishment is that all the elements of the crime charged shall be proved beyond a reasonable doubt."
>
> *Christoffel v. United States,* 338 U. S. 84, 89;
>
> *Brinegar v. United States,* 338 U. S. 160, 174;
>
> *Tot v. United States,* 319 U. S. 463.

Further, the various documents and entries in the file must stand the test of relevancy, competency, and materiality to ensure that, in a criminal proceeding of this nature, appellant will enjoy due process of law.

In referring to the various documents in the selective service file, appellant will use the pagination which appears to have been placed at the bottom of each page in ink or pencil by hand.

Examining the chronology of events reflected by the file we find:

September 21, 1956, SSS Form 252 was mailed to appellant, ordering him to report for Induction on October 4, 1956. (P. 14.)

October 1, 1956, appellant, on receiving the notice to report, dispatched a letter to the draft board acknowledging its receipt, and setting forth his belief in God and his Commandments which prevented him from participating in military service and stating his intention not to report for induction. (Pp. 65-66.)

October 3, 1956, appellant's letter was received by the local board. (P. 14.)

October 8, 1956, the induction papers were returned to the local board. The notation was made in the minutes of the board (Failed to Report for Induction). (P. 14.)

The papers themself which were returned to the local board bear no notation anywhere upon them indicating that appellant failed to report. (Pp. 27 to 42.)

October 9, 1956, the local board dispatched a letter to appellant asking him to appear at the local board on October 15, 1956. (P. 26.) The local board's minutes are strangely silent concerning the transmission of this communication.

October 11, 1956, apparently appellant appeared prior to the date fixed in the local board's letter of October 9, 1956. At the time of this appearance, a Dependency Form (SSS Form 118) was completed by appellant at the board's request, and his written statement reduced to writing and made part of the board's records. (Pp. 14, 21 to 25.)

November 3, 1956, appellant's cover sheet was transmitted to the State Director. (P. 19.)

November 23, 1956, the State Director was notified by national headquarters that it was determined that appellant be reported to the United States Attorney for prosecution as a delinquent, though the nature of the delinquency is not stated. (P. 18.)

December 11, 1956, the U. S. Attorney was notified by the local board of appellant's alleged delinquency. (Pp. 15-16.)

Completely absent from the file is any evidence of compliance with Section 1642.4(b) requiring the completion of SSS Form No. 304 in duplicate, setting forth the duty or duties which the registrant failed to perform. Equally absent is any evidence that, in accordance with said section, the original of said form was mailed to appellant.

In the absence of Section 1642.3, it would be clear that a failure to comply with Section 1642.4(b) would constitute a violation of due process and would vitiate the proceedings entirely.

*Knox v. United States,* 200 F. 2d 398.

Conceding, *arguendo,* that a failure to comply with Section 1642.4(b) does not part a prosecution of appellant, appellant contends that compliance with Section 1642.4(b) constitutes an essential link in the necessary chain of evidence required to convict appellant for violation of the Act.

In the absence of the execution of SSS Form No. 304, what evidence is there in the record to sustain the conviction?

The Delinquent Registration Report was signed by the clerk of the local board. Her typewritten statement on the Report states:

> "On October 4, 1956 the registrant refused to report for Induction. He claims to be a conscientious objector and that his beliefs in God and his commandments will not allow him to enter the Armed Forces." (P. 16.)

Since the obligation of appellant to report for induction required him to report to the Induction Center, rather than the local board, it is clear that the statement of the clerk of the local board is hearsay. If the minutes be examined, it is clear that appellant did not present himself at the local board. The conclusion of the clerk, then, is a conclusion which she drew from appellant's letter to the local board informing them of his beliefs. If this be true, then the report signed by the clerk is even more inaccurate, since appellant's letter was dated October 1, 1956, and received by the local board on October 3, rather than October 4. Thus, the letter was received the day before appellant was required to report to the Induction Center.

The letter from national headquarters to the State Director, in addition to being hearsay, is of no more probative value. It states that appellant should be reported for prosecution "as a delinquent in accordance with the provisions of section 1642.41 of the regulation." (P. 18.) However, Section 1642.41 encompasses a variety of offenses. It includes registrants who fail to report (subsection a), registrants who fail to report on an Order for Transferred Man to Report for Induction (subsection a), registrants from other local boards suspected of being delinquents (subsection c).

This Honorable Court will note from the voluminous record that appellant has remained steadfast in his beliefs. In 1953, he was indicted, tried and acquitted of the same offense. On that occasion, there was more evidence than is present in the instant case. The Court will note that in 1953, when the papers were returned from the Induction Center to the local board, the Induction Center entered upon the documents "Refused to be inducted 11 Aug. 1953." (P. 46.)

In the present case, there is a total lack of valid, relevant, material inculpatory evidence. Certainly, the record does not start to present evidence sufficient to overcome the presumption of innocence, and it does not even hint at evidence sufficient to show, beyond a reasonable doubt, that appellant has violated the Act.

## II.

## By Its Action in Reopening the Question of Appellant's Classification, the Local Board Barred the Prosecution of Appellant.

### A. Preliminary Statement.

Subsequent to the receipt of appellant's letter dated October 1, 1956, setting forth his religious beliefs, the local board instructed him to make a personal appearance at its office. At that time, he was given a dependency questionnaire to complete, and the local board had him reduce to writing his statements as to his religious beliefs, and these documents were than filed and considered by the local board.

It then becomes clear that the local board was considering appellant's letter of October 1, 1956 as a request to reopen the question of his classification and reclassify him in I-O. From the procedure which was followed,

it is apparent that the local board followed Section 1642.14 pertaining to personal appearance, reopening and appeal.

In reaching its determination that appellant was not entitled to reclassification in I-O, or any other classification other than I-A, the local board considered his oral and written statements, and his written dependency questionnaire. Under those circumstances, an appeal lay pursuant to Section 1642.14(c). The action of the local board, then, was not review, but reclassification.

**B. The Court Was Estopped to Prosecute Appellant.**

The power of the court to prosecute for violation of the Universal Military Training Act is no greater than the power of the court to enforce any other administrative order. An administrative determination made by a body duly exercising its grant of power is binding on the agency and upon the court under the doctrine of estoppel.

*United States v. Shaughnessy,* 101 Fed. Supp. 432.

The discharge of an administrative function by a body to whom the authority has been duly delegated is binding upon the government.

*United States v. Great Northern Railway,* 287 U. S. 151, 153;

*United States v. Stewart,* 311 U. S. 70, 71.

A court may not enforce an administrative order, if that order is not in effect at the time judicial enforcement is sought.

*Minneapolis & St. Louis R. v. Peoria etc. Ry.,* 270 U. S. 580.

That the board has the power to strip the court of jurisdiction to prosecute is clear from the regulations.

Under Section 1642.4(c), "A registrant who has been declared to be a delinquent may be removed from that status by the local board at any time." There is no question, then, that the local board has the power to deprive the court of jurisdiction to prosecute. Appellant contends that the local board's power be exercised directly, or inferentially by operation of law.

In the instant case, when appellant appeared before the local board in October, 1956, he presented evidence as to his religious views which may or may not have been new evidence for the local board to consider. In addition, he submitted his dependency questionnaire which was certainly new evidence to be considered. The courts have already held that where a registrant protests the local board's classification and claims an exemption but introduces no new evidence, the board has the duty to again classify and send him another notice of classification.

*United States v. Stiles,* 169 F. 2d 455;

*United States v. Adamowicz,* 119 Fed. Supp. 635.

How much truer is it, then, that where new evidence is presented, the registrant must be reclassified, so that his right of appeal remains intact.

Thus, the classification which existed on October 4, 1956, no longer existed when the indictment was returned. It has been replaced by a newer classification. The court, therefore, was estopped to hear the prosecution.

**C. The Action of the Local Board on November 1, 1956, Constituted a Remission.**

As appellant has heretofore pointed out, pursuant to Section 1642.4(c) the specific power to remove a registrant from delinquency status has been delegated to the

local board. This is the power which it can exercise expressly. It may also review its own classification inferentially. By reopening a classification and examining new proofs, the local board has superseded the old classification as surely as if it specifically declared it null and void. This follows, even though after examining the new proofs, the local board gives the registrant the same classification which he held before. Under similar circumstances, it has been held that a failure or refusal to receive new or further information constitutes a denial of due process of law, whether the local board titles its action an act of review or an act of reclassification.

*United States v. Zieber,* 161 F. 2d 90.

The result of a reclassification is to an administrative agency what the repeal of a criminal statute is to a court. If a statute be repealed or rendered inoperative, no further proceedings can be had to enforce it in pending prosecutions.

*United States v. Chambers,* 291 U. S. 221;

*Yeaton v. United States,* 5 Cranch 281.

"The repeal of the law imposing the penalty is of itself a remission."

*Maryland etc. v. Baltimore & O. R.,* 3 How. 534, 552.

It is respectfully submitted that by reopening appellant's classification, even though he was reclassified I-A, the local board remitted the violation, if any, of the prior order to report for induction, and the court was without jurisdiction to prosecute appellant.

## III.

## Appellant Has Been Deprived of Due Process of Law.

### A. All Actions of the Local Board After January 16, 1954, Are Void.

Failure to accord registrant the procedural rights provided by the Selective Service Act and the regulations promulgated thereunder invalidates the action of the draft board.

*Knox v. United States,* 200 F. 2d 398.

The very essence of the validity of the draft board orders is that all procedural requirements must be strictly and faithfully followed. A failure to follow them with such strictness and fidelity will invalidate the board's order and a conviction based thereon.

*Olvera v. United States,* 223 F. 2d 880;

*United States v. Hufford,* 103 Fed. Supp. 859.

The local board had ordered appellant to report for induction on June 15, 1953. Based upon his religious beliefs, appellant refused to report for induction. He was declared a delinquent, and an indictment sought and obtained against him for violation of U. S. C., Title 50, App., Sec. 462—Universal Military Training and Service Act. On January 12, 1954, in case number 23221-CD, appellant stood trial in the United States District Court before the Honorable Peirson M. Hall, and acquitted of the charge. (P. 129.)

Upon being notified of the acquittal on technical grounds, the local board sought authority to reopen and reclassify appellant from the District Coordinator. This request was made on or about January 13, 1954. While the letter seeking this permission is undated (p. 128),

the minute entry would indicate that January 13, 1954 was in fact the date. (P. 12.)

On February 15, 1954, authority was granted by the District Coordinator to the local board to reopen the classification and to cancel the order for induction under the provisions of Section 1625.14 of the Selective Service Regulation. (P. 127.)

(1) The Purported Grant of Authority Is Void.

Section 1625.3 of the Regulations provide that the local board may reopen and consider anew the classification of a registrant "upon the written request of the State Director of Selective Service or the Director of Selective Service . . ."

This is a grant of specific administrative authority. It is not a ministerial act which the State Director will be called upon to perform but rather a discretionary one. This being so, in the absence of authority in the Regulations or the Act to delegate the prerogatives of the State Director to a subordinate, any such attempted delegation is void.

Nowhere in the Act or Regulations is the State Director authorized to delegate this function to the District Coordinator. He is limited in the Regulations to the hiring of necessary personnel within the limits of available funds. (Sec. 1604.14.)

Thus, if the State Director failed to act, and if the District Coordinator lacked authority to act, everything done or attempted to be done after January 13, 1954, was also void.

(2) Assuming, Arguendo, That the Purported Grant of Authority Was Valid, It Was Never Exercised.

If we assume, *arguendo,* that the District Coordinator had the authority to reopen the classification, as he purported to do in his letter of February 15, 1954, the local board nevertheless failed to carry out its duties under that grant of authority and the Regulations.

The last paragraph of the letter of February 15, 1954, recites:

> "Under the authority vested in me by the State Director of Selective Service for the State of California, the registrant's classification is hereby reopened under the provisions of Section 1625.3. After the classification has been reopened the local board is authorized to cancel the order of induction under the provisions of Section 1625.14 of the Selective Service Regulations." (P. 127.)

The provision of the Selective Service Regulations to which the District Coordinator referred to, Section 1625.14, provides:

> "When the local board has reopened the classification of a registrant, it shall cancel any Order to Report for Induction (SSS Form No. 252) which may have been issued to the registrant. If, after the registrant's classification is reopened, he is classified anew into a class available for service, he shall be ordered to report for induction in the usual manner."

This Section spells out a procedure and a timetable. First, the local board reopens the classification. Second, it cancels any Order to Report for Induction which may

have been issued. Thirdly, it reclassifies the registrant. A failure to follow any one of these steps makes any subseqent steps void.

*Olvera v. United States,* 223 F. 2d 880.

In the instant case, there is a fatal defect violative of Section 1625.14. At no time has the Order to Report for Induction issued to appellant on July 27, 1953 ever been cancelled by the local board. Until that Order is cancelled, the local board lacks authority to reclassify appellant and order appellant to report based upon the results of such reclassification.

Every step taken by the local board since February 15, 1954, following the reopening of appellant's classification is void.

**B. The Failure of the Local Board to Reclassify Appellant on or After October 11, 1956, Deprived Appellant of Due Process of Law.**

After October 4, 1954, appellant was asked to report for a personal interview with the local board. Apparently, his letter dated October 1, 1956, was being treated as a request for a reclassification. On October 11, 1956, the local board heard appellant. It then reduced his statement to writing, in accordance with the reclassification procedure, and also accepted new evidence in the form of the dependency questionaire.

It then made its order, by a vote of 2 to 0, purporting to review, rather than reclassify. Thereafter, on November 2, 1956, the local board notified appellant that the facts presented did not justify the reopening of his case, or his reclassification. (P. 20.)

Since only classifications or reclassifications are subject to appeal (Sec. 1626.2), the local board deprived appellant of his right to appeal its administrative finding as to the sufficiency of the new evidence to warrant reclassification.

It is axiomatic that due process of law requires an opportunity for review of an administrative decision.

*Yakus v. United States,* 321 U. S. 414, 433;

*Southern R. Co. v. Virginia,* 290 U. S. 190;

*St. Joseph Stock Yard Co. v. United States,* 298 U. S. 38.

Not only may the local board not deprive appellant of the right of appeal by this subterfuge, but it has the affirmative duty to determine if the registrant is seeking some procedural right, and, on ascertaining that he is, grant that procedural right.

*United States v. Derstine,* 129 Fed. Supp. 117.

Even if new evidence had not been presented, where a registrant protests a local board's classification and claims an exemption, the board has the duty to again classify and send him another notice of classification.

*United States v. Stiles,* 169 F. 2d 455;

*United States v. Adamowicz,* 119 Fed. Supp. 635.

Having been deprived of his right of appeal, appellant was deprived of due process of law, and any act taken by the government after October 11, 1956, was void.

## IV.

## Appellant Has Been Once in Jeopardy.

Appellant recognizes that customarily a special defense which is not raised at time of trial is waived. However, a defense based upon a Constitutional guaranty is one which goes to the very jurisdiction of the Court and may be raised at any stage of the proceedings.

A general verdict of acquittal upon an issue of not guilty to an indictment is a protection against a second trial.

*United States v. Ball.* 161 U. S. 622.

Where a person is convicted of a crime which includes several incidents, a second trial for one of those incidents puts him twice in jeopardy.

*Ex parte Nielsen,* 131 U. S. 176.

Appellant has already pointed out that the local board ordered appellant to report for induction on June 15, 1953. For his refusal to report, he was indicted, tried and acquitted. Thereafter, that order to report for induction was never cancelled. It was in full force and effect when he was indicted for the second time. Since it was the only Order validly in effect, it permeates the indictment. The appellant was convicted for failure to report for induction. There was only one order to report for induction then in effect. That order was one which he had already been acquitted of violating. It follows, therefore, that the second trial, and the conviction, constituted double jeopardy.

## Conclusion.

Appellant respectfully submits that his Selective Service Record consists of a litany of errors, oversights, and violations of due process of law. The local board has displayed a relaxed disregard for the Regulations, and the Fifth Amendment to the Constitution. Since the entire case rests upon the service record, and since the record is silent as the evidentiary facts sufficient to support the judgment, the judgment must be reversed.

Respectfully submitted,

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